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In the Supreme Court of the United States

OCTOBER TERM, 1926

Nos. ——

D. B. HEINER, COLLECTOR OF INTERNAL REVENUE for the Twenty-third District of Pennsylvania, petitioner

v.

THE COLONIAL TRUST COMPANY, EXECUTOR OF THE will of Glenn T. Braden, deceased

---

C. G. LEWELLYN, FORMER COLLECTOR OF INTERNAL Revenue for the Twenty-third District of Pennsylvania, petitioner

v.

THE COLONIAL TRUST COMPANY, EXECUTOR OF THE will of Glenn T. Braden, deceased

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PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF

The Solicitor General on behalf of D. B. Heiner, Collector of Internal Revenue for the 23rd Pennsylvania District, and C. G. Lewellyn, former Collector of said district, prays that writs of certiorari issue to review the judgments of the Circuit Court

of Appeals for the Third Circuit (R. 101) entered in the above cases on January 11, 1927, affirming the judgments of the United States District Court for the Western District of Pennsylvania (R. 2).

STATEMENT

These cases involve the question whether, under the Revenue Act of 1916 and the subsequent Revenue Acts down to and including that for 1921, income derived from the sale of oil extracted from Osage Indians tribal lands by a non-Indian operating lessee is exempted from taxation. The question is not one of power, but of the intention of Congress as expressed in the statute. The statutes imposed an income tax on income received "from all sources by every individual * * * subject only to such exemptions and deductions as are hereafter allowed * * *" so as to include "gains or profits, and income derived from any source whatever." Into this statute the Circuit Court of Appeals has read an implied exemption of the income of a lessee of tribal lands, derived from operations under the lease.

The facts are not in dispute and the case was tried to the court on a stipulation of facts. (R. 31.)

In the court below the record was not printed in the *Lewellyn case*, because of a stipulation that it would abide the outcome of the *Heiner case*. (R. 94, 97.)

Prior to 1917 (R. 10) Glenn T. Braden, a white citizen of the United States, procured an oil lease

from the Tribal Council of the Osage Tribe of Indians in Oklahoma covering a portion of the lands of said tribe in that State. This lease was on a form prescribed by the Secretary of the Interior, was approved by that officer as required by law, and was made subject to lawful rules and regulations then in force or thereafter promulgated by the Secretary of the Interior. Braden as lessee agreed to pay the Superintendent of the Osage Indian Agency for the lessor, as royalty, the sum of 16⅔% of the gross proceeds from the sale of oil produced by him, or 20% if the quantity of oil taken from oil producing wells on any quarter section during any calendar month exceeded 100 barrels per well per day. (R. 11.) The lessee was required to commence drilling operations within a specified time or, upon failure to drill, to pay a specified rental periodically.

As a result of his development of the land thus leased, Braden, during the period from 1917 to 1921, inclusive, produced oil therefrom in large quantities. From the sale of his part of said oil, exclusive of royalty, he derived income during said period upon which there was assessed and collected income and excess-profits taxes in the sum of $822,346.20.

Braden died on September 23, 1923, and his executor, the respondent, on April 4, 1925, filed two suits against the respective Collectors to whom the above tax had been paid for the recovery thereof. Judgment for the plaintiffs in each case was ren-

dered by the District Court, and these judgments were affirmed by the United States Circuit Court for the Third Circuit.

ASSIGNMENT OF ERRORS

1. The court erred in holding that the income of a non-Indian operating lessee of Osage Indian tribal lands derived from the sale of oil extracted therefrom was exempt from taxation under the Federal Revenue Acts.

2. The court erred in holding that to tax income derived by a non-Indian operating lessee of Osage Indian tribal lands from the sale of oil extracted therefrom was to tax said Indians and that said income was therefore exempt from the taxes imposed by the Federal Revenue Acts.

REASONS FOR GRANTING THE PETITION

I. The language of the statutes is express. It covers the income of all individuals from any source whatsoever, with only those exemptions provided in the Act. The Act does not by its terms exempt income derived by lessees of Indian lands from operations under their leases. The court was not warranted in reading into the statute an implied exemption. Reading into the statute an implied exemption of Indians' income is going far enough in support of the governmental policy toward Indians. It does not follow that because a State may not tax such income Congress has not intended to tax it. Many incomes derived from sources which

render them immune from State taxation are taxed under the Revenue Acts. The question involved is a substantial one.

II. Under each Revenue Act the Bureau of Internal Revenue has consistently held that income derived by operating lessees of Indian lands is taxable. This is the first case in which any decision has been rendered to the contrary. Under this construction of these statutes very large sums have been collected by the United States. In the consideration of this petition the Treasury Department has estimated that the amount of taxes collected, and which will be refundable if the decision of the Circuit Court of Appeals in this case is sustained, is $150,000,000.

III. As bearing on the future operation and effect of the decision below, attention is called to the Annual Report of the Commissioner of Indian Affairs for the year ending June 30, 1926, p. 12, which discloses that there were then in force in the Osage Indian and Five Civilized Tribes oil and gas leases covering 566,602 acres and 785,535 acres, respectively, and that the gross production of oil thereunder for that year was 41,907,021 barrels. The same report, on page 13, shows that 6,976 acres of restricted Quapaw Indian lands were under lease and that 289,622 tons of lead and zinc were produced. On the usual royalty basis, the income of mineral lessees of the lands of the Osage, Quapaw and the Five Civilized Tribes of Indians for the one

year covered by the report was in excess of $98,000,000. The report also discloses, page 12, that oil leases were in force covering lands of the Navajo Indians in New Mexico and other reservations in Oklahoma and in Idaho.

Wherefore, it is respectfully submitted that this petition should be granted.

WILLIAM D. MITCHELL,
Solicitor General.

APRIL, 1927.

SUPPORTING BRIEF

OPINIONS BELOW

The opinion of the District Court (R. 82) is reported in 12 F. (2d) 481. The opinion of the Circuit Court of Appeals (R. 99) is reported in 17 F. (2d) 36.

JURISDICTION

The judgments of the Circuit Court of Appeals to be reviewed were entered January 11, 1927. (R. 101.) The jurisdiction of this Court to issue the writ is found in the Act of February 13, 1925.

QUESTION PRESENTED

The question presented is whether, under the Revenue Act of 1916 and the subsequent Revenue Acts down to and including that for 1921, income derived from the sale of oil extracted from Osage Indians' tribal lands by a non-Indian operating lessee is exempted from taxation. The question is not one of power, but of the intention of Congress as expressed in the statute.

STATUTES INVOLVED

Section 1 (a) of the Revenue Act of 1916 (c. 463, 39 Stat. 756) provides:

> That there shall be levied, assessed, collected, and paid annually upon the entire net income received in the preceding calendar year from all sources by every individual, a citizen or resident of the United States, a tax * * * (here follow the rates).

Section 2 (a) of the Revenue Act of 1916, as amended by the Act of 1917 (c. 63, 40 Stat. 300, 329), defines income as follows:

> That, subject only to such exemptions and deductions as are hereinafter allowed, the net income of a taxable person shall include gains, profits, and income, derived from salaries, wages, or compensation for personal service of whatever kind and in whatever form paid, or from professions, vocations, businesses, trade, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in real or personal property, also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.

The pertinent sections of the later applicable Revenue Acts and definitions of gross and net income are not substantially different from those above quoted and are not here set out in full.

STATEMENT

A statement of the facts and of the errors assigned will be found in the petition.

ARGUMENT

As the court below said in its opinion, this case is one of far-reaching importance. (R. 100.) It is settled that the income in question may not be taxed by a State.

Choctaw & Gulf R. R. Co. v. *Harrison,* 235 U. S. 292.

Indian Territory Illuminating Oil Co. v. *Oklahoma,* 240 U. S. 522.

Howard v. *The Oil Companies,* 247 U. S. 503.

Gillespie v. *Oklahoma,* 257 U. S. 501.

Jaybird Mining Co. v. *Weir,* 271 U. S. 609.

But although a State may not tax it, Congress has the power to do so, and the question is one of intention to be derived from the terms of the Revenue Acts.

These Acts are explicit in taxing the income of "every individual" derived "from any source," subject only "to such exemptions and deductions as are hereinafter allowed." There is no suggestion in the terms of the statute that income of those who deal with and make profit out of transactions with Indians shall be exempt. The exemption, if it exists, must be read into the statute by implication.

In March, 1924, the Attorney General rendered an opinion that income received by individual members of the Five Civilized Tribes of Indians from

tax-exempt lands allotted in severalty by the United States was not subject to Federal income taxes. He reached this conclusion by reading into the statute an implied exemption based on the proposition that a taxing statute of the United States should not be construed to apply to such income of Indians unless it expressly so stated. 34 Op. 275.

In March, 1925, he rendered another opinion to the same effect respecting the income of the Quapaw Indians derived from their restricted lands. 34 Op. 439.

The conclusions of the courts below in the present case purport to be based largely on the reasoning of the Attorney General in these two cases, but it is clear that the courts below have taken a step in advance of anything that the Attorney General has decided.

In the first opinion the Attorney General held that if allotted lands or tribal lands are inalienable, there is an implied exemption of the income from the lands from taxation by the United States, and in the second opinion it was held that there is an implication that Congress intended to exempt the income of Indians derived from such lands from income taxation. In the present case, an additional implied exemption is resorted to, to the effect that Congress must have intended that those buying oils from the Indians or extracting oils under leases from the Indians are exempt from in-

come taxes on the profits they derive through the disposition of what they so acquire.

This problem resembles the house that Jack built, and there must be some point at which implied exemptions from taxation cease.

See *Thomas* v. *Gay,* 169 U. S. 264; *Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514.

Even the opinions of the Attorney General that the income of the Indians from their restricted lands is intended by Congress to be exempted from income taxation have not been accepted by the Board of Tax Appeals. *Appeal of Leah Brunt,* 5 B. T. A. 134.

It does not necessarily follow that Congress has intended to exempt from taxation those things which the States have no power to tax. On the contrary, a different policy has been pursued by Congress with respect to many subjects, such as compensation of Federal officers, which may not be taxed by the States, but which Congress has intended to and does tax.

The theory advanced to sustain the decisions below is that the taxation of the income of the Indian lessees throws a burden on the Indians, because if the lessee were exempt from taxation on the income he derives from the operation of his lease he would probably take that into account in negotiating the lease and offer a higher royalty than he would if he must pay income taxes. This is altogether theoretical and not practical. Certainly, those who have heretofore obtained Indian

oil leases have not fixed the amount of their rents or royalties with any such consideration in mind. No court has heretofore held that their income should be exempt, the Treasury Department has consistently held it is taxable, and it is not conceivable that Braden, the deceased lessee in this case, who took his lease in 1917, or any other lessee under similar conditions, gave any weight to the prospect of its being ultimately held that his income from operating the lease would be tax exempt, or that the Indians benefited to any extent by that prospect.

CONCLUSION

The case is one of very great importance to the Treasury; the sustaining of the decision below confronts the Treasury with the possibility of refunds in an estimated aggregate sum of $150,000,000; the question is a new one, and it can not be said that the decision below is so obviously right as not to merit argument.

It is respectfully submitted that the petition should be granted.

WILLIAM D. MITCHELL,
Solicitor General.

A. W. GREGG,
General Counsel, Bureau of Internal Revenue.

APRIL, 1927.

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